IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

BLOEMFONTEIN

SCA CASE NO: 1105/2019

CENTRE FOR ENVIRONMENTAL RIGHTS	Amicus Curiae

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Appellant
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Appellant
SABELO DUMISANI DLADLA	Third Appellant

and

TENDELE COAL MINING (PTY) LIMITED	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA aKWAZULU-NATAL HERITAGE COUNCIL	Ninth Respondent

FILING NOTICE

TAKE NOTICE THAT the First Respondent herewith files it's:

HEADS OF ARGUMENT IN RESPONSE TO THE AMICUS CURIAE'S HEADS OF ARGUMENT

DATED AT BLOEMFONTEIN ON THIS 22 JULY 2020.

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BLOEMFONTEIN

AND : **YOUENS ATTORNEYS**

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 1105/2019
KZP CASE NO: 11488/17P

CENTRE FOR ENVIRONMENTAL RIGHTS	Amicus Curiae

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Appellant
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Appellant
SABELO DUMISANI DLADLA	Third Appellant

and

TENDELE COAL MINING (PTY) LIMITED	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA aKWAZULU-NATAL HERITAGE COUNCIL	Ninth Respondent

TENDELE'S HEADS OF ARGUMENT IN RESPONSE TO THE AMICUS CURIAE'S HEADS OF ARGUMENT

INTRODUCTION

1 Did mining operations that commenced before the One Environmental System on 8 December 2014, require both a mining right under the MPRDA and a separate environmental authorisation under NEMA, or was an EMP approved in terms of the MPRDA sufficient? This is the primary issue addressed by the *amicus*.[1]

2 Tendele stands by the submissions in our main heads of argument. In these heads we demonstrate that the *amicus's* argument to the contrary is unsustainable.

THE MPRDA AND NEMA

3 The *amicus* submits that:

3.1 NEMA and the MPRDA must be interpreted in accordance with the Constitution and, in particular, the environmental right enshrined in section 24 of the Constitution.[2]

3.2 Section 2 of NEMA and its other provisions require a risk-averse and cautious approach to mitigate negative impacts on the environment and establishes principles for decision-making on matters affecting the environment which apply throughout South Africa and alongside all other appropriate and relevant considerations.[3] This implies that the processes

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1 *Amicus* HOA para 7.

2 *Amicus* HOA paras 8 – 12.

3 *Amicus* HOA paras 12 – 15.

prescribed in NEMA apply in addition to other statutory authorisation processes and may not be excluded in favour of other statutory authorisation processes.

3.3 A series of judgments from the Constitutional Court and various divisions of the High Court support this interpretation.[4]

3.4 The plain language of NEMA is inconsistent with an EMP under the MPRDA being equated with or conflated with an environmental authorisation under NEMA.[5]

3.5 NEMA is the specific statute aimed towards the furthering of the constitutional environmental right in section 24 and cannot be side-stepped in favour of the MPRDA.[6]

4 It is striking that the *amicus* does not engage with the careful argument contained in Tendele's main written submissions. Those submissions were to the effect that:

4.1 Tendele's current activities (those activities which were already being conducted before the One Environmental System was brought into effect on 8 December 2014) are not subject to the requirement to obtain an environmental authorisation under NEMA because at the time that they commenced the environmental impacts of mining activities and activities incidental thereto were regulated exclusively through the MPRDA and in

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4 *Amicus* HOA paras 21 – 28.

5 *Amicus* HOA paras 33 – 39.

6 *Amicus* HOA paras 40 – 45.

particular through the requirement under that Act to obtain an EMP prior to commencing mining and to ensure that mining takes place in accordance with an approved EMP.

4.2 Tendele's proposed mining activities and activities incidental thereto (those which have yet to commence in terms of the 2016 mining right) are catered for by the transitional provisions contained in the NEMA Amendment Act and the 2014 Environmental Impact Assessment Regulations. In terms of these provisions, because Tendele's applications for the 2016 mining right and the associated EMP were pending at the time that the One Environmental System commenced, they fell to be adjudicated on the basis of the law as it was under the old regime.

5 The amicus asserts that all mining activities and activities incidental thereto are subject to the requirement of obtaining an environmental authorisation under NEMA, regardless of when they commenced. But it fails to engage with Tendele's submissions, which are based upon the particular text of the relevant legislation, the amendments thereto and the transitional provisions.

6 Most fundamentally, the amicus does not address the primary argument advanced in Tendele's main heads of argument that, in enacting the MPRDA, the legislature made a deliberate choice: instead of rendering those subject to its provisions also subject to the pre-existing provisions of NEMA, it chose to subject them to the principles of NEMA, as interpreted and applied by the functionaries of the Department of Mineral Resources in accordance with the MPRDA and the regulations promulgated in terms thereof.

7 The *amicus* in its heads of argument relies on a range of judgments which it contends are authority for the proposition that even before the enactment of the One Environmental System, an environmental authorisation under NEMA as well as an EMP under the MPRDA was required for the undertaking of mining and incidental activities. None of the cases referred to is authority for that proposition.

8 The only judgment which supports the proposition that the *amicus* contends for, is *Mineral Sands Resources.*[7] But in *Mineral Sands:*

8.1 The statement relied upon at paras 7 to 8 of the judgment was *obiter* in the context of the judgment as a whole. The judgment related to the validity of a search warrant issued by a magistrate against a mining company.

8.2 The proposition, which is repeated at paragraph 17, appears only in Rogers J's summary of the legislative environment and was not one of the findings upon which the validity of the search warrant depended. Rogers J set aside the search warrants that had been granted for different reasons entirely. His findings in relation to the requirement of obtaining an environmental authorisation were, accordingly, *obiter dicta* and not binding statements of the correct interpretation of the statutes.

8.3 Nor does the issue seem to have been argued in any detail before him and the statements in his judgment are not supported by any detailed reasoning.

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[7] *Amicus* HOA paras 21-22, referring to *Mineral Sands Resources v Magistrate for the District of Vredendal and Others* [2017] 2 All SA 599 (WCC).

8.4 Rogers J's summary of the relationship between an EMP approved under the MPRDA, which he states "*effectively constituted the environmental authorisation to conduct the mining activity*",[8] and an environmental authorisation under NEMA, ignores the provisions included in the MPRDA at the time for consultation between the designated authority under the MPRDA and the competent authority in terms of NEMA in the consideration of EMP's. This provision, it is submitted, was intended to avoid the untenable situation where holders of mining rights would potentially face competing and contradictory but mandatory directions from two authorities in respect of the same activity.

9 None of the other judgments referred to is authority for the relevant proposition.

9.1 In *Earthlife Africa*, Murphy J merely restates the language of section 24 of NEMA.[9]

9.2 In *Mining and Environmental Justice Community Network of South Africa*[10] Davis J makes no finding whatsoever about the interaction between the MPRDA and NEMA prior to the enactment of the One Environmental System. The entire case arose in a post-One Environmental System context, notwithstanding Davis J's reference to section 39 of the MPRDA, which had been repealed by the time the dispute in the matter arose. In any event, the summary of the statutory

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[8] *Mineral Sands Resources (supra) at para 17.*

[9] *Amicus* HOA para 24, referring *to Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP)

[10] *Amicus* HOA para 25 referring to *Mining & Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others* [2019] 1 All SA 491 (GP)

framework does not constitute part of the *ratio* of his judgment and certainly does not amount to a reasoned or considered finding in support of the proposition the applicants contend for.

9.3 The Constitutional Court's judgment in *Fuel Retailers*[11] says nothing at all about the interaction between the MPRDA and NEMA and deals with the entirely different question of the relationship between the Town-Planning and Townships Ordinance, 15 of 1986, and NEMA.

9.4 The Constitutional Court's judgment in *Maccsand*[12] relates primarily to the interaction between the Cape Land Use Planning Ordinance, 15 of 1985 ("LUPO") and the MPRDA. It says nothing at all about the interaction between the MPRDA and NEMA before the enactment of the One Environmental System. In any event, the Court's finding that the MPRDA (which regulates mining) must be applied alongside LUPO (which regulates land use planning) is not authority for the proposition the applicants contend for. As mentioned above, prior to the commencement of the One Environmental System, the MPRDA regulated the environmental impacts of mining exclusively. At that stage NEMA did not regulate mining, as mining was not a listed activity. The option of applying the two Acts alongside each other does not arise.

10 Finally, in giving meaning to the MPRDA and NEMA, it must be recalled that both pieces of legislation are enacted to give effect to section 24 of the Constitution.[13]

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[11] *Amicus* HOA para 26 referring to *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management* 2007 (6) SA 4 (CC) at para 86.

[12] *Amicus* HOA para 27 relying on *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC).

[13] MPRDA section 2(h).

The amicus's attempt to prioritise NEMA because of its status as legislation giving effect to section 24 of the Constitution is accordingly misplaced. Both statutes were enacted for that purpose and must be interpreted in that light.

CONCLUSION

11 We accordingly submit that:

11.1 The interpretation contended for by the *amicus* is inconsistent with the purpose and language of NEMA and the MPRDA as they were prior to the commencement of the One Environmental System.

11.2 The *amicus* has not engaged at all with Tendele's main written submissions, which explain why the provisions of the MPRDA as it was prior to the commencement of the One Environmental System regulated the environmental impacts of mining exclusively.

11.3 The authorities relied upon by the *amicus* either do not support the proposition they contend for or are *obiter dicta*.

11.4 The *amicus* ignores the fact that the MPRDA, too, is legislation giving effect to section 24 of the Constitution.

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22 July 2020